

**10-PA-1271
IN THE MATTER OF ARBITRATION
BETWEEN**

**SCHOOL SERVICE EMPLOYEES, SEIU
LOCAL 284, SOUTH ST. PAUL, MINNESOTA**

and Union,

**INDEPENDENT SCHOOL DISTRICT 748,
SARTELL, MINNESOTA**

Employer.

**ARBITRATION DECISION
AND AWARD
BMS Case No. 10-PA-1271
(Contract Interpretation)**

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	July 21, 2010
Date Record Closed:	August 25, 2010
Date of Award:	September 23, 2010

APPEARANCES

For the Union:

Carol Nieters
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SEIU Local 284
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For the Employer:

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INTRODUCTION

The School Service Employees, SEIU Local 284, South St. Paul, Minnesota (“Union”) and Independent School District No. 748, Sartell, Minnesota (“Employer” or “District”) are parties to a Collective Bargaining Agreement (“Contract”), Employer Exhibit 1. The Contract is effective July 1, 2007 through June 30, 2010. The Union filed a grievance on December 14,

2009, which the parties were unable to resolve, and in accordance with the Contract, the matter was referred to arbitration. The parties duly selected the undersigned as the arbitrator from a list provided by the Bureau of Mediation Services.

On July 21, 2010, the Arbitrator convened a hearing at the offices of the Bureau of Mediation Service, St. Paul, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously by U.S. mail, and the record closed when the Arbitrator received the last brief on August 25, 2010. The parties have waived their right under Article XIV to receive the decision and award of the arbitrator within 30 days of the close of the hearing.

ISSUE

The parties do not agree about the issue to be considered. I have adopted the issue as stated in the grievance document from which this arbitration arises:

Did the Employer violate Article 8, Section 5, “Long Term Disability Leave” or a binding past practice when it reinstated Carrie Miller after an extended leave of absence and assigned her to drive bus route S-12?

FACTS

A. STATEMENT OF THE CASE.

The Grievant, Carrie Miller, a bus driver/transportation specialist (hereafter, “bus driver”) for the school district, was on an extended leave of absence due to two shoulder injuries allegedly suffered on the job and subsequent surgeries to correct her condition. When she was cleared by her physician to return to work December 14, 2009, the Employer assigned her to bus route S-12. This job was in the same job class as the job she held before her leave of absence,

but the number of hours work was less than the hours to which Ms. Miller believed she was entitled

B. BACKGROUND.

The District hired Carrie Miller in July 1999. She began working as a bus driver several years later. In May of 2005, she suffered an injury to her right shoulder. Since that time, she has had problems with both shoulders and has periodically been unable to work. Eventually, after surgery on both shoulders, her recovery progressed to the point where her health care providers concluded she could return to work driving a school bus if it was equipped with an air suspension seat and a door-opening device that did not require repetitive shoulder motion. The District was equipped with such busses, and Ms. Miller returned to work in December of the 2009-10 school year. At that time, Ms. Miller was more senior than all of the bus drivers except for two.

Bus drivers in the District do not work full time. Prior to each new school year, the District sets out new bus routes and employees bid for the routes they desire. Some bus routes are longer than others. Some involve driving special education students who may have multiple conditions requiring extra attention and who may become upset with a change in drivers during the school year. There are also shorter kindergarten routes that apparently may be added to a regular, longer route. The routes may change every year. The District makes an estimate of the number of hours required to drive each route at the beginning of the year, and the total hours may be adjusted by the District as the year continues and conditions change.

When the Grievant returned to work in 2009, a question arose concerning what the appropriate route assignment should be. The Grievant last drove a regular bus route for a full year during school year 2006-07. This route totaled 6 hours driving time including a

kindergarten route. During the 2007-08 year, the Grievant had work restrictions due to her shoulder condition. She apparently bid on the same route and the District awarded her that route she had previously, but the route was driven by a substitute during much of the school year. In 2007-08, she was assigned a 4.75 hour route. In 2008, after another surgery, she was not allowed to bid for a 2008-09 route because she was on a medical leave at the time of bidding. At some point during 2008-09 year, she was assigned a 4.00 hour route.

At the time the bus routes were posted for bidding for the 2009-10 school year, the Grievant was on a leave of absence. Although the Employer did not notify her of the bidding, she learned of it through other employees and added her name to the bidding list for several routes for the 2009-10 year. She bid on the routes known as S-13, S-12, and S-39, in that order. She was not assigned a route at the beginning of the year, but in December, when she was ready to begin work, she was assigned Route S-12, classified as a 4.5 hour route. She was not assigned a kindergarten route, because the remaining kindergarten routes were assigned to the two employees with more seniority.

Route S-12 was similar to the route she had driven previously. The Grievant bumped the less senior employee who had been assigned that route at the beginning of the year. The District assigned Route S-12 to the Grievant based on seniority and two other factors: 1) that this assignment would be least disruptive to other employees; and 2) that this assignment would be least disruptive to the special education students who were served by the bus driver on the longer, S-39 route she desired.

The assignment to Route S-12 seemed unfair to the Grievant for a number of reasons. First, it proved to be only four hours of actual driving time, not the 4.5 hours to which she believed she was entitled, and therefore, her pay was less than she anticipated. Second, she

believed that she should have been assigned Route S-39, because prior to the start of school, she had bid on that route and the District had assigned a less senior employee to it. Route S-39 was classified as a 5.25 hour route. The District argues that it did not intend to extend bidding opportunities to the Grievant or to any employee who was on a leave of absence at the time of annual bidding. (This intention must not have been communicated to the employee in charge of the bidding process, because the Grievant added her name to the bid sheets.)

C. CONTRACT PROVISIONS.

The grievance document claims that the Employer violated Article VIII, Section 5 of the Contract. That section states:

Article VIII, Section 5. Long Term Disability Leave:

Subd. 1. An employee, upon written request to the Superintendent or his/her designee accompanied by a doctor's certification of disability, shall be granted a long-term disability leave of absence without pay. The leave shall be for the length of time the employee is certified by the doctor to be unable to perform duties. No employee on long-term disability leave may return to active status without a doctor's certification of being able to perform duties...

At the hearing and in its post-hearing brief, the Union claimed that the Employer violated Article XII, Section 4:

Article XII. Discharge, Recalls, Vacancies, Probation, Retirement, Resignations.

Section 4. Seniority is hereby defined as continuous employment in the School District from the most recent date of employment.

...

Subd.4. An employee with seniority under this Section, who subsequently receives a reduction in work hours, which cause the employee to no longer qualify for seniority under this section, shall be considered to be laid off. As such, the employee shall be treated as provided in Section 5 of this Article.

Subd. 5. Employees who receive a reduction of hours of fifteen (15) minutes or more per work day or 1 1/2 hours or more per week for a minimum of four (4) weeks shall allow said employee to have bumping rights as determined in Section 5 of this Article.

Section 5. Lay-offs and Bumping Rights The School District recognizes that the purpose of seniority is to provide a declared policy as to the order of lay-off and recall of employees, insofar as possible, depending on employee's qualifications. Employees with the

least continuous service in their classification shall be laid off first. Said employees shall be given two weeks written notice of such lay-off by the Superintendent or his/her designee. Such employees shall have the right to bump the least senior employee in the same classification or in the next lower classification if the employee is qualified to perform the duties of the position. This bumping procedure shall continue until the least senior employee is laid off...

Section 9. Vacancies, Dismissal and Lay-offs:

Subd. 1. Vacancies: New positions or vacancies of more than thirty (30) days duration will be posted within five (5) work days of a know position vacancy. Vacancies shall be posted for a period of five (5) work days and the senior qualified applicant will be assigned thereto five (5) work days after close of posting...

UNION POSITION

The Union asserts that the Grievant should have been assigned Route S-39 because it was the longest route for which she was eligible based on her seniority. The Union believes that the Grievant should have been allowed to bid on a route prior to the school year, and barring that, she should have been assigned Route S-39 when she came back to work in December, because routes are to be distributed based on seniority, and the Grievant was more senior than the employee who drove Route S-39. The Union argues that the parties have bargained over seniority and job assignments, and the Contract and past practice forbids the District from assigning employees fewer hours when they return to work after a leave of absence than they were assigned when they left on leave. The Union argues that the Grievant's job assignment violated an established past practice and that the District owes the Grievant \$2,300.00 in lost wages because it assigned the Grievant to a route with insufficient hours upon her return from leave.

EMPLOYER POSITION

The District asserts that the grievance should be denied for several reasons. First, it did not violate any Contract provision when it assigned the Grievant Route S-12 upon her return to work. Nothing in the Contract requires the District to allow an employee on leave to bid on a

route, and even it did, she would have been assigned her old route, S-13, a 4.25 hour route based on the choices she made, not route S-39. Second, the District did not violate any enforceable past practice when it assigned to the Grievant Route S-12 upon her return from the extended leave; there was no agreed upon past practice for assigning routes to employees who return to work in the middle of the school year. Third, the Grievant was not harmed because the District reinstated her to the same job class and assigned her a route similar to the last route she drove, so the Grievance should be denied and the Grievant is not entitled to any lost pay.

DISCUSSION AND DECISION

This case is a question of contract interpretation. The Union contends that the District violated the collective bargaining agreement when it assigned Route S-12 to the Grievant in December 2009. Arbitrators typically resolve disputes concerning the interpretation of a collective bargaining agreement by using a sequential analysis to determine the intent of the parties. First, the arbitrator looks to the language of the Contract. If it is clear and unambiguous, that language should control. If that is not the case, the arbitrator should look to other indicia of the parties' intent. Among the indices that are relevant are bargaining history and past practice. See Elkouri & Elkouri, How Arbitration Works Ch. 9 (6th ed. 2003).

It is not unusual that the parties to a collective bargaining agreement find that although each side thought the language of the Contract was clear on a given point, a new situation may arise to which the language does not speak directly. Then the arbitrator is given the task of filling in the gaps, or deciding how the language should apply to a set of facts that the parties had not previously discussed. *See*, Elkouri & Elkouri, *id.* at 442.

The Union contends that the Contract requires that bus driver routes are to be assigned by strict seniority when an employee returns to work after an extended leave of absence. For

example, the Union cites the language of Article XII defining seniority, and concerning layoff, recall, and filling of vacancies. But the Grievant was not laid off and recalled, and there was no vacant bus driver position, so this language does not apply. If the Union's argument is that Section 9 applies to the Grievant's situation because "new positions" are to be posted and bid, the posting and bidding for the 2009-10 school year took place in July 2009, before the Grievant was qualified to drive any bus route. Section 9 does not require the Employer to make an exact correlation between seniority and length of the route when an employee returns to the job after new routes are assigned.

In its Grievance, the Union cites Article VIII, Leaves of Absence, to support its argument. That Article discusses various kinds of leaves of absence and the responsibilities and benefits that accrue to an employee who is granted a leave of absence. Although it is not clear exactly what type of leave the District granted Ms. Miller, only one type of extended leave mentions the rights of an employee upon reinstatement; that is Section 6, Maternity Leave. Section 6, subd. 4 provides in pertinent part:

Subd. 4. Upon conclusion of the maternity leave or within thirty (30) days of signifying her intent to return to work, the employee shall be reinstated to her original job or to a position of like status and pay...

Obviously, this subdivision does not apply directly to the Grievant's situation since pregnancy was not the reason for her extended leave. Nonetheless, it provides some insight into the possible intent of the parties. That is, when an employee returns to employment after a significant absence and is once again able to do the job, the District will reinstate the employee to a position of like status and pay similar to the job she left.

According to the records, the Grievant was assigned to a 4.00 hour per day bus route in 2008-09. One year before that, in 2007-08, her route was 4.25 hours per day on paper. By assigning her a

4.50-hour route, the District reinstated her to a position of like status and pay to the one she left. Because the Contract does not specifically address returning a bus driver in Ms. Miller's circumstances, the general rule is that the employer retains the right to direct employees and assign job duties, as it did here.

The Grievant claimed that the Employer should have allowed her to bid on the 2009-10 jobs in July when the other bus drivers bid on routes. Posting and bidding occurred before her doctor released her to return to work. At that time, the District did not know when, if ever, the Grievant would again be qualified to drive a school bus, and it did not violate any provision of the Contract by restricting the bidding to employees qualified to do the work at the beginning of the school year.

Alternatively, The Union is asking that I find there is an implied term of the Contract based on past practice that applies to the Grievant's circumstances. Many arbitrators, when called upon to decide whether a past practice should be considered a binding provision of the labor agreement, distinguish between cases where the past practice provides an employee benefit and cases where the practice affects a basic management function. See, Elkouri & Elkouri, How Arbitration Works, at 610, BNA (6th ed. 2003). Arbitrators hesitate to permit unwritten past practice to restrict the exercise of recognized functions of management, such as methods of operation or direction of the workforce. *Id.* at 612. If not part of the written agreement, a past practice to be binding on both parties, must be clearly enunciated and acted upon. There must be persuasive evidence that the practice existed over a reasonable period of time as an established practice accepted by both parties. *Id.* at 608.

As previously discussed, bus driver routes are assigned by seniority based on posting and bidding prior to each school year as set out in the Contract, and the Contract also establishes that

seniority governs filling of vacancies. I did not hear evidence of an on-going practice that employees on leave who become able to drive mid-year have consistently been assigned routes as the Union desires. A past practice, to have binding effect on the parties, must not only be shown to exist and have been acted on over a reasonable period of time; it must also have been a practice that was mutually acceptable. I am not persuaded that such a practice existed.

The District considered seniority as a factor in assigning the Grievant to Route S-12 in December 2009, but it was not the only factor considered. I find nothing in the Contract prohibiting the decision the District made in assigning Route S-12 to the Grievant. Arbitrators are hesitant to add implied terms to a contract unless there is substantial evidence of an agreed upon past practice that has been accepted by both parties. There is none here.

CONCLUSION

Neither the Contract nor past practice requires the District to make a direct correlation between seniority and the length of a driver's route when the driver returns from a leave of absence mid-year.

AWARD

The Grievance is denied.

Dated: September 23, 2010

Andrea Mitau Kircher
Arbitrator